

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

LeRoy K Wheeler,)	
)	
Plaintiff,)	Case No. 2:12-cv-45
)	
vs.)	ORDER ADOPTING
)	REPORT AND RECOMMENDATION
Rena M. DeSautel, Diane J. Manthei, and)	
Mark J. McCarthy,)	
)	
Defendants.)	

The Court has received a Report and Recommendation from the Honorable Karen K. Klein, United States Magistrate Judge, recommending that LeRoy Wheeler's complaint filed under 42 U.S.C. § 1983 be dismissed with prejudice as frivolous because it is barred by the statute of limitations (Doc. #12). The Magistrate Judge further recommends that the Court find that any appeal would be frivolous, could not be taken in good faith, and may not be taken *in forma pauperis*. Wheeler objected to the Report and Recommendation, with his chief argument being that the Court cannot dismiss on timeliness grounds because he was instructed to abandon a previous 1983 complaint and petition for habeas corpus instead (Doc. #16).

Wheeler's contention stems from a previous 1983 action that he brought in 2005. In case number 2:05-mc-03, Wheeler brought a 1983 action against two court reporters for the improper transcription of preliminary court proceedings.¹ In an order issued by Magistrate Judge Klein, Wheeler was directed that the legality of his confinement may only be challenged through a petition for habeas corpus, not a 1983 petition. Wheeler's 1983 petition was dismissed, and the Clerk for

¹ case number was originally 2-PC-05-003, but this has since been changed to conform to the numbering protocol in the Court's CM/ECF filing system.

the United States District Court, District of North Dakota, was directed to mail Wheeler the appropriate forms for filing a petition for habeas corpus under 28 U.S.C. § 2254. The Magistrate Judge's Order was later affirmed by this Court. Wheeler asserts that because he was directed to abandon his previous 1983 action, the current action should be allowed to proceed.

Wheeler overlooks the conspicuous fact that his previous 1983 action was against different defendants arising out of different circumstances. The previous complaint was filed against Karen A. Aamodt and S. Michelle Bredemeier concerning preliminary hearing transcripts. The current complaint was brought against Rena M. DeSautel, Diane J. Manthei, and Mark J. McCarthy for alleged errors in the trial transcripts. Wheeler has had copies of the trial transcripts since November 1, 2005, and failed to bring an action against the named defendants within North Dakota's six-year statute of limitations. See Carpenter v. Williams County, North Dakota, 618 F. Supp. 1293 (D.N.D. 1985). The statute of limitations was not tolled by the unrelated previous action, and accordingly, Wheeler's objection to the Report and Recommendation is without merit.

Having reviewed the Report and Recommendation, along with the entire record in this matter, the Court concludes that the Magistrate Judge's position is correct. The Court adopts the Report and Recommendation in its entirety. The Court **ORDERS** that Wheeler's petition is **DISMISSED WITH PREJUDICE** because it is frivolous in nature. It is **FURTHER ORDERED** that any appeal of this decision would be frivolous, could not be taken in good faith, and may not be taken *in forma pauperis*. In light of the dismissal, it is **FURTHER ORDERED** that Wheeler's Motion to Compel (Doc. #10) is **DENIED** as moot.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 3rd day of December, 2012

/s/ Ralph R. Erickson
Ralph R. Erickson, District Judge
United States District Court